

Ethics and the Allure of Social Media
PROGRAM and MATERIALS¹
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Twitter, Facebook, Blogs, LinkedIn, etc., are the new tools in our lives. On the positive side, social media offers opportunities for networking, research, marketing and client development. On the negative side, it presents new opportunities for the unwary to engage in professional misconduct.

Through a number of comedic skits we will explore the ethical challenges (e.g., ex parte communications, confidentiality, misrepresentation, appearances and influences on the decision-making authority) that present themselves in the context of social media “friending” relationships. We will also consider whether the ABA Model Rules of Professional Conduct are clear enough to address the blurring line between our personal lives and our professional lives. Finally, we will consider what effect, if any, social media is having on the core values of professionalism.

Skit I: YES - I WILL FRIEND YOU

Theme:

Exploring ex parte and appearances of impropriety that arise from use of social networking by decision-makers and lawyers.

Based loosely on:

- North Carolina Judicial Standards Commission, Inquiry No. 08-234 (Public Reprimand of B. Carlton Terry, Jr.) (April, 2009).

<http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf>

Attorney Rules Authority:

Model Rule of Professional Conduct 1.1 (Competence)

Model Rule of Professional Conduct: 3.5 (Impartiality and Decorum of the Tribunal)

¹ Thanks to James Aurek Moran for assistance in the preparation of this document.

See Comment No. 1 thereunder, requiring a lawyer to avoid contributing to a violation of the ABA Model Code of Judicial Conduct)

Model Rule of Professional Conduct 8.4 (Misconduct)

Question: Can a judge (or any decision-maker) friend an attorney who might appear before him or her, and vice versa?

- Florida Sup.Ct., Judicial Ethics Advisory Committee, Opinion No. 2009-20 (November 2009). Also, Opinion No. 2010-04; Number 2010-05; Opinion No. 2010-06.

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>

Judge may post Code-conforming material; may NOT “friend” appearing attorneys; Candidacy committee may post Code-conforming material

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-04.html>

Judicial assistant may “friend” attorneys, but activities must be totally independent of and unrelated to Judge

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html>

<http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>

Judge need not “de-friend” fellow member of voluntary bar assoc. (organization page, not individuals’ pages); but may NOT friend appearing attorneys; Attorneys may NOT accept judges’ friend requests

- South Carolina Advisory Committee on Standards of Judicial Conduct, Opinion 17-2009

<http://www.judicial.state.sc.us/advisoryOpinions/displayadvopin.cfm?advOpinNo=17-2009>

Allowing a Magistrate to be a member of a social networking site allows the community to see how the judge communicates and gives the community a better understanding of the judge. Thus, a judge may be a member of a social networking site such as Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do NOT discuss anything related to the judge’s position.

- Supreme Court of Ohio Board of Commissioner on Grievances and Discipline, Opinion 2010-7 (December 3, 2010).

Opinion 2010-7 - Supreme Court of Ohio and the Ohio Judicial System
(Download)

While a judge may be a “friend” on a social networking site with a lawyer who appears in a case before the judge, certain guidelines are set out: Judges’ conduct must conform with conduct Rules (maintain dignity, etc), should not discuss pending matters, erode confidence in judiciary and may in instances of bias or prejudice need to disqualify himself/herself from a proceeding.

- Ethics Committee of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119 (2010).

http://www.google.com/url?sa=t&rct=j&q=ethics%20committee%20of%20the%20kentucky%20judiciary%2C%20formal%20judicial%20ethics%20op.%20je-119%20&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2Fcourts.ky.gov%2FNR%2Frdonlyres%2FFA22C251-1987-4AD9-999B-A326794CD62E%2F0%2FJE119.pdf&ei=Xh2HT-vpD8qgtwfjnZzcBw&usg=AFQjCNE-kby3-qLbJ5uDfmabfSE_c_JJDA&sig2=af0ITecAXuLF0Onz7OR1bQ

Judges may “friend” appearing attorneys; Strongly cautions judges to maintain high standards of conduct, be mindful of whether online relationship reaches level of “close social relationship,” requiring disclosure, recusal.

- New York Advisory Committee on Judicial Ethics, Op. 08-176 (2009).

While not prohibited from being a member of a social networking site, a judge should be mindful of “appearance created” with such connections that may rise to the level of a “close social relationship” requiring disclosure and/or recusal.

<http://www.courts.state.ny.us/ip/judicialethics/opinions/08-176.htm>

- Oklahoma Judicial Ethics Advisory Panel, Opinion 2011-3 (July 2011).

Judge may be on social site, may NOT friend appearing attorneys.

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=464147>

- Judicial Ethics Committee of the California Judges Association, Opinion 66 (November 23, 2010).

May be on social site; CAN “friend” attorneys who “may” appear; May NOT friend attorneys with pending cases before them, must “de-friend” if already friends and appearing in pending case AND disclose.

<http://www.caljudges.org/files/pdf/Opinion%2066FinalShort.pdf>

- Massachusetts Committee on Judicial Ethics Opinion No. 2011-6 (December 28, 2011)

May NOT friend attorney who may appear.

<http://www.mass.gov/courts/sjc/cje/2011-6n.html>

Skit II: CHECK MY BLAWG!

Theme:

Maintaining vigilance in the intersect of personal and professional social media communications.

Based loosely on:

- In the Matter of Peshek, IL ARDC, 09 CH 89 (Aug. 25, 2009) Ill S Ct MR 23794 (May 8, 2010). (Found on www.iardc.org)
- The Florida Bar v. Sean William Conway (Case No. SC08-326) (Public Reprimand).
<http://www.floridabar.org/DIVADM/ME/MPDisAct.nsf/DisActFS?OpenFrameSet&Frame=DisActToC&Src=%2FDIVADM%2FME%2FMPDisAct.nsf%2FdaToc!OpenForm%26AutoFramed%26MFL%3DSean%2520William%2520Conway%26ICN%3D200751308%26DAD%3DPublic%2520Reprimand>
- Fieger v. Michigan Supreme Court, 553 F.3d 955 (6th Cir. 2009).

Attorney Rules Authority:

Model Rule of Professional Conduct 1.1 (Competence)

Model Rules of Professional Conduct 1.6 (Confidentiality of Information)

Model Rule of Professional Conduct Rule 3.6 (Trial Publicity)

Model Rule of Professional Conduct Rule 8.2 (Judicial and Legal Officials)

Model Rule of Professional Conduct Rule 8.4 (Misconduct)

Other:

Skit III: WHO IS TXTING NOW?

Theme:

A lawyer's affirmative duties to educate and supervise nonlawyer staff and the bar on "pretexting"

Attorney Rules Authority:

Model Rules of Professional Conduct 1.1 (Competence)

Model Rules of Professional Conduct 5.1 (Responsibilities of Partners, Managers & Supervisory Lawyers)

Model Rules of Professional Conduct 5.2 (Responsibilities of a Subordinate Lawyer)

Model Rules of Professional Conduct 5.3 (Responsibilities Regarding Nonlawyer Assistants)

Model Rules of Professional Conduct 4.1 (Truthfulness in Statements to Others)
Model Rules of Professional Conduct 8.4 (Misconduct)

- Phila. Bar Ass'n: Op. 2009-02 (March 2009).

http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf

It IS misconduct for third party to “friend” witness to get info for attorney.

- Oregon State Bar Association Opinion No. 2005-164 (August 2005).

A knowing internet communication with a represented person is prohibited.

- New York Bar Association Committee on Professional Ethics, Opinion 2010-2 (Sept. 2010).

Lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent.

- San Diego County Bar Legal Ethics Committee, Legal Ethics Opinion, 2011-2 (May 24, 2011).

Ethics rules bar an attorney from making an ex parte “friend” request of a represented party.

Skit IV: PATRICIA’S DILEMMA

Theme:

Why good lawyers sometimes do bad things.

Based loosely on:

In the Matter of Kerry Irene O’Sullivan, Illinois Supreme Ct. No. M.R.; Commission No. 2011PR00078.

Contrast with:

Public Admonishment of Judge Gregory M. Casky (California Commission on Judicial Performance - July 6, 1998).

Attorney Rules Authority:

Model Rules of Professional Conduct 3.5 (Impartiality and Decorum of the Tribunal)

Ethical Fading: The Role of Self-Deception in Unethical Behavior, Social Justice Research, Vol. 17, No. 2, June 2004.

<http://www.business.illinois.edu/responsibility/docs/ethical-fading-2004.pdf>

1. Patricia is experiencing an ethical dilemma.

2. The situation requires that she comports her conduct with the Rules, most specifically Rule 3.5.
3. The right and wrong responses to the situation are capable of being discerned.
4. She wants to do the right thing but.....something happens. Her judgment is being clouded by factors that are irrelevant and detrimental to sound decision-making:

What are these factors?

Additional Item of Interest:

ABA Commission on Ethics 20/20 Initial Draft Proposals - Technology and Confidentiality.

www.abanet.org/ethics2020